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Nos. 91 & 93

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

IVAN C. McLEOD, REGIONAL DIRECTOR FOR THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

EMPRESA HONDURENA DE VAPORES, S.A.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Petitioner,

v.

EMPRESA HONDURENA DE VAPORES, S.A.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR UNITED FRUIT COMPANY AS *AMICUS CURIAE*

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR UNITED FRUIT COMPANY AS *AMICUS CURIAE*

Interest of United Fruit Company

United Fruit Company files this brief as *amicus curiae* pursuant to Rule 42 (2) of this Court, with the consent of all parties. It was a party to the proceedings before the

National Labor Relations Board (Case No. 2-RC-10379 [IR. 9]). United Fruit Company was named as the alleged employer in the petition filed by the National Maritime Union (NMU), the labor organization seeking to represent the unlicensed seamen on the 13 ships managed and operated by Empresa Hondurena de Vapores, S.A., a Honduran subsidiary of United Fruit (IR. 10).

The Board held United Fruit together with Empresa to be ". . . joint employers of the employees covered by the petition" (IR. 16). The Court of Appeals for the Second Circuit, in its unanimous decision, found ". . . the Board's statement that United Fruit is a 'joint employer' to be an erroneous legal conclusion which must be disregarded" (IR. 62, n. 3).

In view of its direct interest in these proceedings, United Fruit Company files this brief to urge that it is not, and never has been, the employer of these seamen under any valid legal theory. United Fruit Company also supports the position of the respondents that the Board does not have jurisdiction over a representation case involving Honduran citizens serving as seamen on Honduran flag ships owned and/or operated by a Honduran corporation, the stock of which is owned by United Fruit Company. However, it leaves the principal burden of such argument with the parties directly involved in this representation proceeding, its primary interest being that the Court of Appeals' determination, that United Fruit is not the joint employer of the Honduran seamen, be upheld.

Question Presented

The question which United Fruit Company considers to be presented for decision may be stated as follows:

> Whether the National Labor Relations Act gives the Board power to determine questions concerning the

union representation of Honduran citizens and residents who are hired in Honduras to serve on Honduran flag ships owned by a Honduran corporation, which is managed by its own officers and directors resident in Honduras, who fully control the Honduran corporation's labor relations, where the ownership of the stock of the Honduran corporation is in an American corporation which time charters those Honduran ships, for voyages to and from ports in the United States and Honduras, as well as world ports, on the theory that the American corporation is the joint employer of the Honduran citizens.

Statement

The relevant facts in Numbers 91 and 93 are set forth in the decision of the National Labor Relations Board (IR. 9-19) and in the complaint in the District Court for the Southern District of New York (IR. 1-8). The stenographic transcript of the representation proceedings are not a part of the printed record before this Court and no reference to that transcript will be made in this brief. In any event, there is no factual issue involved in this proceeding.

But the absence of a dispute on facts does not mean that the Statement in the Board's brief (pp. 3-8) gives a full exposition of the findings below. That statement confines to one paragraph (p. 6, 1st paragraph) the two most salient factual conclusions reached by both the Board and Court of Appeals; namely that:

(a) Empresa—and not United Fruit—is solely and completely responsible for the administration of its day-to-day affairs and exercises complete control over its labor relations policies; and

(b) Empresa and its employees have deep-rooted contacts of long duration with the Honduran sovereignty and

economy including residences, citizenship, home ports, Honduran trade, place of hire, collective bargaining and many others.

It is submitted that the Board expresses concern with general matters not here in issue such as the relatively recent growth of Panamanian and Liberian flag fleets. Such irrelevant references which inevitably color the facts present different factual issues not here on review. (See, e.g., Board's Brief, pp. 18-21; 27-33.) This proceeding deals with an enterprise which has been part of the Honduran economy for over twenty years; it does not involve ventures set up during "the past ten years" (p. 18), nor ships "transferred from American registry" (p. 19), nor vessels which "never visit the flag country" (p. 19). The facts set forth in the record reveal the fullness of the Honduran nationality of Empresa and its standing, separate from United Fruit, as the sole employer of the Honduran seamen.

1. The Parties to this Proceeding.

A. United Fruit Company.

United Fruit Company is a publicly owned New Jersey corporation with business interests extending throughout the world (IR. 12). Its principal business is the growing, transporting, and selling of agricultural products including bananas, sugar, and cacao (IR. 12). These commodities are transported and sold to various world markets including United States ports, on ships which are owned by United Fruit or chartered from many other companies, including Empresa (IR. 12).

B. Empresa Hondurena de Vapores, S.A.

Empresa Hondurena de Vapores, S.A. is a Honduran corporation, which was organized under the laws of the Republic of Honduras in 1941. It has its principal office

and place of business at Puerto Cortes, Honduras (IR. 1). Its "principal business is owning and/or operating 13 seagoing vessels which are registered under the laws of Honduras, fly the Honduran flag, are manned by unlicensed seamen employed in Honduras . . . under shipping articles executed in Honduras" (IR. 1). United Fruit owns all the stock of this Honduran corporation (IR. 13).

As shipowner and operator, Empresa provides ships that are fully equipped with crew and provisions and ready to put to sea (IR. 14). In describing the responsibilities of Empresa as an owner of vessels under time charter, the Board found:

> "Thus, it [Empresa] is responsible not only for the physical condition of the ships and for provisioning them, except for fuel, but also for hiring the officers and crews and handling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel. There is nothing in the record to suggest that Empresa does not in fact carry out these typical responsibilities of the owner of a vessel under a time charter." (IR. 14)

These 13 ships are time chartered to United Fruit Company and others, and visit ports in Central and South America, the United States, Canada and Europe (IR. 3, 13, n. 11). Each of these ships regularly call at Honduran ports for the purpose of taking on and discharging cargo, and to renew ship's articles (IR. 3, 15, 60).

Empresa's principal office is and always has been in Honduras (IR. 1). None of its officers (who are elected by the Directors) or Directors "is employed by or associated with United Fruit Company and since its formation in 1941 all of its officers and directors have resided in Honduras" (IR. 2, 13). Empresa operates as a completely separate corporate entity in Honduras, with its own real estate and its own corporate records (IR. 13).

C. The Honduran Citizens and Residents Sought to be Represented by the American Union.

About 334 Honduran citizens serve as unlicensed seamen aboard Empresa's 13 ships. Only one non-Honduran citizen, a Jamaican, is employed (IR. 4, 60). As the Board found:

> "The crews are hired in Honduras, are composed almost wholly of citizens of that country, and sign Honduran shipping articles." (IR. 14, n. 15)

In hiring these Honduran seamen in Honduras, it is required by Honduran law that the seamen furnish a Honduran passport, a Honduran seamen's identification book issued under the Honduran Merchant Marine Act, a certificate of Honduran military inscription, and certain medical certificates issued by Honduran health officials (IR. 4).

Since 1941, the unlicensed seamen have been represented for purposes of collective bargaining, by Sociedad Nacional de Marineros de Honduras ("Sociedad"), a Honduran labor organization recognized under Honduran law as the seamen's exclusive collective bargaining agent (IR. 4), to which all of Empresa's seamen belong pursuant to paragraph 10 of the current collective bargaining agreement (IR. 27).[1]

---

[1] Sociedad did not participate in the proceedings before the Board. Another and different union, known as Sindicata Maritimo Nacional de Honduras ("Sindicato"), claiming to be a labor organization admitting Honduran seamen to membership, also did not participate. The statement in Board's brief that Sindicato participated (Bd. Br. p. 4) is inaccurate and contradicted by note 22 of the Board's decision (IR. 17). After the close of the hearing, without notice, hearing, or an opportunity to examine into Sindicato's interest or standing as a labor organization, Sindicato was permitted to intervene, over objection of petitioning union NMU and other parties.

D. The National Maritime Union.

National Maritime Union (NMU) is an American labor organization, representing American seamen on American flag ships, which filed a petition with the Board seeking to represent the Honduran seamen on Empresa's ships (IR. 9-10). NMU is not qualified to represent Honduran employees under the Honduran Labor Code and Regulations (IR. 5, 61).

2. Empresa Solely and Directly Controls the Policies and Labor Relations of the Honduran Seamen

The basic relationship between the parent, United Fruit Company, and its various subsidiaries was found by the Board to be as follows (IR. 12-13):

> "The primary purpose of UFCO's operating through subsidiaries is to achieve, as its vice-president explained in his testimony, a decentralized control of the companies' many activities in which the subsidiaries, more or less specializing in particular types of undertakings, deal with the day-to-day problems of their operations while over-all policy and development control resides in the parent company."

Empresa, as has been noted above, operates its own business through its own officers and directors resident in Honduras (IR. 13). Empresa hires, fires, and determines the wage scale and conditions of employment of its employees. It also negotiates and executes collective bargaining agreements with representatives of its employees. It separately and independently performs each and every labor relations or personnel function concerning its own employees. There has been absolutely no finding that any

direction in this regard emanates from United Fruit. Rather the Board found that Empresa:

> "has the sole and exclusive authority and control over all matters concerning terms and conditions of employment including hiring, firing, wages and discipline of employees" (IR. 4).

Not a single one of the officers and none of the directors of Empresa is an employee of, or associated with, United Fruit (IR. 2). As the Board found, there are ". . . no interlocking directors with, or officers common to, Empresa and its parent" (IR. 13).

In Empresa's own offices in Puerto Cortes, Honduras, it interviews and hires all of the seamen who are referred to it by a Honduran union (IR. 1). After hire, these seamen sign articles of employment with Empresa in Honduras (IR. 4). Empresa maintains all of its own business records (IR. 13).

The Board found that Empresa, not United Fruit, is responsible solely ". . . for hiring the officers and crews and handling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel." (IR 14). For more than 20 years Empresa has recognized and bargained with Sociedad Nacional de Marineros de Honduras, a labor organization, recognized as a juridic person by the Republic of Honduras (IR. 4, 22). It has a current collective bargaining agreement with that union which does not expire until February of 1963 (IR. 60).

The current collective bargaining agreement, a copy of which is set forth at length in the record (IR. 22-35) covers all of the terms and conditions of employment including:

(a) Recognition (IR. 23)

(b) the union shop (IR. 23, 27)

(c) special allowances for meals (IR. 24)

(d) repatriation (IR. 25)

(e) maritime labor accidents (IR. 25)

(f) compensation for accidents (IR. 25-26)

(g) no strikes or lockouts (IR. 27)

(h) wages for each unlicensed classification (IR. 28)

(i) vacations (IR. 29)

(j) maintenance and cure (IR. 30)

(k) hours of work (IR. 31-32)

(l) holidays (IR. 32)

(m) overtime (IR. 33) and

(n) term of contract (IR. 34)

This collective bargaining agreement was signed by the president of Empresa, residing in the Honduran city of San Pedro Sula and the union president residing in Puerto Cortes (IR. 22).

The recognition given by Empresa to Sociedad is compelled by Honduran law, under the terms of which Empresa "is required to recognize the Union as the exclusive bargaining agent of its unlicensed seamen" (IR. 5). This obligation entails the making and administering of collective bargaining agreements (IR. 22).

Labor grievances are handled by representatives of Empresa and the union, and if not settled are referred to a public solicitor from the Ministry of Labor in Honduras, the labor courts in Honduras and the Minister of Labor of Honduras (IR. 5). Empresa and its seamen are within the jurisdiction of the Labor Court of the Department of Cortes and "[a]ny controversies which arise between these parties are subject in accordance with the provisions of th Constitution and the law, to said Labor Court" (IR. 40, 41).

3. Empresa's Honduran Seamen and Honduran Flag Ships Are Subject to the Labor Code of Honduras, the Merchant Marine Law of Honduras, and to all of the Regulatory Laws of that Country.

The approximately 330 Honduran citizens and residents who work on Empresa's ships are covered by the labor and social laws of Honduras and receive the benefits therein provided (IR. 4, 5).

Each seaman must possess Honduran documents and Honduran health certificates. After he has been hired in Honduras pursuant to the detailed requirements of Honduran law (IR. 4), he is required to sign ship's articles maintained under Article 24 of the Honduran Merchant Marine Act. These articles are certified by the Commander of the port in Honduras (IR. 4). Officer personnel must be licensed by the Honduran government (IR. 3).

Empresa has never owned or operated any American flag ships (IR. 3). The 13-ships in the Empresa fleet are registered with the Republic of Honduras in compliance with the requirements of the Honduran Merchant Marine Act of 1943 (IR. 3). Each vessel must carry on board as evidence of its registration a "Patente Definitiva de Navegacion" issued by the Commander of its home port, either Puerto Cortes or Tela in Honduras (IR. 3). Such Patente is issued only after Empresa files an application with the Republic of Honduras at the capital, Tegucigalpa, and complies with other requirements of the Merchant Marine Law.

Each vessel must carry a safety equipment certificate and navigation license issued by the Republic of Honduras, together with certain other papers, documents and certificates required by the Honduran law. Empresa's ships carry radios licensed by Honduras and bearing call letters issued by that Republic (IR. 3).

Empresa's ships regularly visit their home ports in Honduras, carry tonnage to and from Honduras, and purchase ship's provisions from that country (IR. 60). Empresa's contacts with Honduras have always been complete and continuous.

4. Empresa May Deal Only With Honduran Unions Under Honduran Law.

Empresa is prohibited from recognizing the National Martime Union by specific provisions of Honduran law which require that no union may function as the collective bargaining representative of Honduras unless "it is composed of at least ninety percent (90%) of Honduran citizens", and unless "recognition of its juridic personality" has been issued by the Minister of Labor of Honduras (Honduran Labor Code, Articles 504 and 490; IR. 5). Pursuant to the provisions of the Honduran Labor Code the Honduran Ministry of Labor has issued a ruling that:

> "The resolution handed down by the National Labor Relations Board of the United States referred to in the petition of the Empresa Hondurena de Vapores, is in conflict with the Constitutional, Labor and Procedural Law of Honduras, which are all a matter of Public Law." (IR. 41)

After declaring, in effect, that the Board's action in assuming jurisdiction over Empresa and its seamen was a direct incursion on the sovereignty of Honduras, the Minister ruled that under Honduran law the Board "cannot intervene in a labor matter which (as here) involves a Honduran shipping company and the seamen who work on its ships which fly the Honduran flag" (IR. 41). It was further determined:

> "That no foreign union can represent the interests of seamen who work on ships sailing under the Honduran flag:" (IR. 42)

The Honduran Labor Minister concluded by stating that any attempt by the Board to assert such jurisdiction over, or to intrude on the employer-employee relationship between, Empresa and its seamen would be held "null and void in accordance with the Honduran Constitutional, Labor and Procedural Law (IR. 42).

5. The United Fruit Company Exercises No Control or Direction Over the Unlicensed Seamen of Empresa.

There is no dispute that United Fruit exercises absolutely no control whatsoever over the direction of Empresa's work force or Empresa's labor relations policies. The Board has specifically recognized that Empresa is solely responsible for the total employer-employee relationship including collective bargaining and discipline of personnel (IR. 14).

United Fruit Company's only relationship with the employees of Empresa is as a time charterer of the ships (IR. 4, 14, 15). Empresa exercises all of the functions of a shipowner as would normally be exercised by any shipowner who time charters his ships to another. Whether United Fruit Company time charters its ships from Empresa or from any Swedish, English, Greek or Liberian shipowner, having no relation with United Fruit Company, the result would be the same. For as the Board has specifically found "There is nothing in the record to suggest that Empresa does not in fact carry out these typical responsibilities of the owner of a vessel under a time charter." (IR. 14). The owners of time chartered ships retain full control of their ships and all aspects of their management, both internal and otherwise, and including labor relations.

Simply stated, the time chartering of a ship is the leasing of a fully manned and provisioned ship which is ready to put to sea. The owner has manned his ship with a Master of his own selection, and with his own officers

and his own seamen. The owner is the only one having the right to hire or fire or in any other way discipline or control the seamen aboard these ships (IR. 14, 15). The charterer normally does not even have a representative aboard the ship which is controlled solely by the shipowner's licensed officers. Certainly, time charter of Empresa's ships to United Fruit, on the above basis, does not integrate the two separate operations of owner and charterer or convert an otherwise foreign shipping venture into an American one.

* * * *

In all of the above facts, only two points of contact with the United States emerge: (a) United Fruit Company's ownership of the stock of the Honduran corporation; (b) the regular entry of Empresa's ships chartered to United Fruit Company into American ports. In effect, the Board found that these two factors were sufficient both to constitute United Fruit as an employer of the Honduran seamen and to constitute the Empresa enterprise as an American one for jurisdictional purposes.

The Circuit Court of Appeals unanimously disagreed. It not only found that the Honduran contacts far outweighed the American points of contact (IR. 77) but also rejected the Board's conclusion that United Fruit, together with Empresa, was a joint employer of the seamen (IR. 62, n. 3). That determination should be affirmed.

Summary of Argument

I. The Court of Appeals properly rejected the Board's legal conclusion that United Fruit, together with Empresa, was a joint employer of the Honduran seamen on the Honduran flag ships in view of the Board's clear findings that Empresa was completely and solely in charge of the operations of its ships and its labor relations with the crew (IR. 62). The Board's conclusion clashes with

established principles of law which require that a determination holding a parent as the joint employer of its subsidiary's employees must be based either on findings of common management or common control of labor policies. Neither of these findings have been made by the Board here. In fact, the opposite conclusions have been reached: that Empresa, solely, and to the exclusion of United Fruit, controls its own business and its own labor relations.

Not a single one of the many factors, which in combination, have been held sufficient by the Courts and the Board to establish the joint employer relationship has been found to exist here. There are no interlocking or common officers or directors; the parent does not participate in its subsidiary's labor negotiations; there is no consultation between parent and subsidiary on labor relations matters; United Fruit does not lay down any basic labor policies for Empresa to follow; there is no similarity of wages, salaries, and working conditions of parent and subsidiary; there are no common employees, no keeping of the subsidiary's books and records by the parent, no common labor relations personnel, no common representation by the same attorney, no common executive offices; nor any of the other accepted indicia of integration used by the Courts and Board in the past.

Nor, as the Board has recognized in other decisions, is the fact that a subsidiary carries in its ships the goods of its parent a conclusive or decisive factor of integration. In the transportation industry, parent and subsidiary have been considered separate employers where one carried or transported goods, cargo, or freight for the other, so long as each maintained its own day-to-day management policies and administered its own labor relations with its respective employees, independently of the other.

The Honduran seamen here receive neither directions nor instructions from any persons employed by United

Fruit Company. They are hired by Empresa personnel in Honduras and serve under Empresa's supervisors wherever they may be from that time forward, whether it be in Empresa's office building in Puerto Cortes, an Empresa ship flying the ensign of Honduras on the high seas, or in ports in Europe, Central or South America, Canada, or the United States. To make such a person the employee of a parent with whom the employee has no concern is to foist a new relationship on the employee of Empresa in such circumstances which is unwarranted by the express factual findings of the Board and of the Court of Appeals. Empresa alone has exercised authority over the employees in question. United Fruit has never had anything to do with them and cannot be held in any sense to be the employer.

II. (a) The National Labor Relations Act was never intended to be applied outside the United States or to affect the relationship existing between foreign seamen serving on ships of their native land which are owned by a native corporation, even though ownership of the stock of the corporation is vested in American interests.

While arguing that the National Labor Relations Act does apply, the Board nevertheless agrees that the Act must be interpreted in such a way as to prevent collision with the laws of a foreign state. Such collision necessarily comes about when an American statute is applied to sever a twenty year relationship of these Honduran employees not only with their own Honduran union, but also with their Honduran labor tribunals and Honduran laws which have guided for so long the employer-employee relationship.

(b) The treaty with Honduras, as the Board recognizes (Bd. Br. p. 45), leaves to the Honduran sovereignty the complete power over all matters pertaining to the internal order of Honduras flag ships. The organization, representation and collective bargaining rights of Honduran seamen are clearly matters relating to the "internal

order" of the ship because they affect rates of pay, hours of work and other conditions of employment.

(c) The State Department and Defense Department of the United States affirm that Board assertion of jurisdiction here would unsettle international relations and subvert national defense policies. The Board has not been given jurisdiction in either of these two fields. It should be required to forbear from interference in these sensitive areas.

(d) In determining who is to regulate a permanent labor relationship, the rule of the law of the flag should govern. Where the nationality of the crewmen and the flag of the ship are non-American, that rule should be treated as conclusive without the need for evaluating points of contact.

Obviously, questions concerning the organization and representation of seamen, of discriminatory discharge, refusal to bargain, rights and duties of unions and employees, are matters dealing with permanent relationships of relatively long duration. Unlike transient tort actions which normally involve a single litigation before an American tribunal, employee relations provide continual opportunity for collision between American and foreign law. In cases involving such a permanent labor relationship the intrusion of American law to the exclusion of the law of the flag country should not be countenanced.

POINT I

The United Fruit Company is not the employer of the Honduran seamen. The Court of Appeals properly rejected the Board's contrary conclusion on the basis of the Board's own factual finding that Empresa carries out all of the responsibilities of a ship owner under a time charter and exercises full control over the labor relations of its personnel.

United Fruit Company has absolutely no responsibilities or rights, as employer, over the Honduran seamen. These seamen are hired by Empresa; directed by Empresa; assigned by Empresa; suspended by Empresa; laid off by Empresa; recalled by Empresa; promoted by Empresa; and disciplined by Empresa, which responsibly directs them and adjusts their grievances (IR. 14, 62) see [e.g., statutory definition of "supervisors" in § 2 (11) of the Act, 29 U.S.C. § 152 (11)].

Not one of these elements of supervisory authority is vested in any United Fruit personnel. "United Fruit Company has no employer relationship whatever with any employee of plaintiff [Empresa] including seamen employees" (IR. 4).

The Board strives to correlate the direction (as to destination, length of port stay, and type of cargo to be loaded), which the Master of each Empresa time-chartered ship receives from United Fruit Company officials, with integration of Empresa's operations with those of United Fruit. Thus, the Board's finding of integration is based on the fact that United Fruit "as the time charterer of the vessels" determines where and when the vessels will sail, that "[i]n exercising its control, UFCO deals directly" with the ship's captain (IR. 14), and that the ships are "under the jurisdiction of UFCO's Marine Division" (IR. 15).

But the above conclusory language describes the normal and habitual practice of a charterer under a time charter. This is not evidence of that type of integration which would make United Fruit the employer of Empresa's seamen. United Fruit's function with respect to where the ship is to go, and the so-called jurisdiction of the Marine Division means nothing more than that United Fruit Company, just like any other time charterer, carries out the "typical responsibilities" of a time charterer, directing Empresa as to how and where the ship is to be used. And in the Board's words, Empresa carries out the "typical responsibilities of the owner of a vessel under a time charter" (IR. 62). This includes the independent maintenance of all relations with the crew.

In exercising United Fruit Company's rights as time charterer, the Marine Division issues the normal charterer's instructions. The very same statement can be applied with equal force to all other ships which are also chartered by United Fruit from time to time, where there is no stock ownership affiliation between UFCO and the vessel owner (IR. 16, n.18). These ships, too, are under the jurisdiction of the Marine Division. As time charterer, United Fruit has a right to determine which ships shall be used in a particular run to carry particular cargo. Exercise of this right is obviously far from the type of "control" which would create United Fruit Company the employer of the seamen on such other chartered ships.

The petition filed by the NMU with the Board named only United Fruit as employer. Empresa voluntarily intervened (IR. 10, n. 2). It is submitted that the Board recognized that it could not hold United Fruit singly as the employer of the Honduran seamen and that the only way it could impose its jurisdiction would be to invent some theory permitting it to treat United Fruit and Empresa as the joint employer of the seamen here involved. Yet the record reveals that not one of the elements making up the

employer-employee relationship exist as between United Fruit and the Honduran seamen. The proof is all the other way. Empresa controls its own business and exclusively and independently directs the labor relationship between it and its crews.

A. United Fruit cannot be considered the employer since none of the factors which constitute a parent the employer of its subsidiary's employees exist here.

Ownership of the stock of a subsidiary does not make the parent corporation the employer of the subsidiary's employees, absent a showing of control by the parent of either the day-to-day business of the subsidiary or its labor relations. The Court of Appeals for the District of Columbia has said in *Press Co.* v. *NLRB*, 118 F. 2d 937, 945 (D. C. Cir. 1940) *cert. den.*, 313 U. S. 595 (1941), where both companies had common officers and directors:

> "Of course, it is true that [parent company], as the owner of all the voting stock of [subsidiary], was in position to dictate its action in any corporate matter, *but until legislation is adopted outlawing holding companies, this alone, in circumstances like these, is not sufficient to annul corporate identity . . .*" (Emphasis supplied)

More reason for application of this principle exists here where United Fruit and Empresa are each governed by different Boards of Directors and led by their own officers. Courts and Board cases which have considered the issue of joint employer have developed many factors found to be necessary to the establishment of that relationship. Among these cases is every one of the eight decisions cited by the Board on page 57 of its brief—cases labeled by the Board as "settled authority" which "clearly justify a finding that Empresa and UFCO constitute an integrated operation or a single or joint employer for purposes of the Act". The

Board—cited cases are briefly discussed in the margin.[2] Analysis of these cases shows that, in every case, the joint employer relationship was based on solid findings of either (1) parental control or common management of the subsidiary's day-to-day business or (2) direct parental participation or intervention in the subsidiary's labor affairs and collective bargaining relationships. No finding of such parental activity was, or could be made, in the case at bar.

Evidence of parental control of business operations or of participation in labor relations manifests itself in a number of different fact situations. The Courts and the Board have required that the following factors, not found in the instant case, be present in order to justify holding the parent as the employer of its subsidiary's employees.

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[2] In *A.M. Andrews Co. of Oregon* v. *N.L.R.B.*, 236 F. 2d 44 (9th Cir. 1956), both corporations had same president, treasurer and secretary. The joint president determined labor policies for the subsidiary.

N.L.R.B. v. *Jones Sausage Co.*, 257 F. 2d 878 (4th Cir. 1958), involved common ownership, common corporate officers, centralized management administration and control of labor policies.

N.L.R.B. v. *Calcasieu*, 203 F. 2d 12 (5th Cir. 1953), dealt with a corporation and partnership wherein the president and chairman of the board of corporation was also general manager of partnership. In addition, there was some centralized administration and control of labor policies.

In *N.L.R.B.* v. *Somerset Classics, Inc.*, 193 F. 2d 613 (2nd Cir. 1952), there was common ownership, common corporate offices and common management.

N.L.R.B. v. *A. F. Nettleton Co.*, 241 F. 2d 130, 131 (2nd Cir. 1957), had five corporations, each with the same principal officers and the same president who "has the final decision on matters involved in collective bargaining."

N.L.R.B. v. *Price Valley Lumber Co.*, 216 F. 2d 212 (9th Cir. 1954), concerned two commonly owned partnerships which operated together on the same premises and which, for payroll and maintenance of records purposes, were centrally administered.

N.L.R.B. v. *National Shoes, Inc.*, 208 F. 2d 688 (2nd Cir. 1953), dealt with two corporations having the same president, sec-

(Footnote continued on following page)

1. *No interlocking or common officers or directors.*

Management of subsidiary and parent by common officers and directors is often pointed to as an important element of control. Common officers and directors were involved in all eight of the cases cited by the Board on page 57, namely, the *Andrews*; *Jones, Concrete Haulers,*

(Footnote continued from preceding page)

retary and treasurer, the same boards of directors, same counsel who conducted their labor negotiations, and the same group of officers determining the labor policies.

N.L.R.B. v. *Concrete Haulers*, 212 F. 2d 477, 479 (5th Cir. 1954) involved a situation in which the two employers had the same President, Vice President, and Secretary Treasurer and, as the Court found "the interdependence and integrated nature of the operations of the respondents, the common ownership of stock, and the fact that the same officer administers a common labor policy, clearly indicate that there is only one employer for the purposes of this Act."

Three other cases also cited on page 57 of the Board's brief are also not applicable.

Local No. 24, International Brotherhood of Teamsters v. *N.L.R.B.*, 266 F. 2d 675 (D. C. Cir. 1959), held that a corporation which leased motorized equipment from other companies was so allied in interest with the lessors as to make action against the latter primary rather than secondary. It was found that the corporation employer "directs the conduct of the lessors' drivers as it would its own drivers" . . . reviews the acceptability of drivers to be hired and recommends "penalties, including discharge" (p. 680).

In *N.L.R.B.* v. *Deena Artware, Inc.*, 361 U. S. 398 (1960), this Court held that the Board was entitled to take depositions and to engage in discovery and inspection to determine whether a group of affiliated corporations "are not what they appear to be, that in truth they are but divisions or departments of a 'single enterprise'" (p. 402), where the Board alleged that a single stockholder (who was president, treasurer and director of each corporation, the remaining officers and directors being his wife, son and secretary) was manipulating the affairs of several related corporations to avoid payment under a back pay order against one of the corporations.

The ruling in *Bowater Steamship Co.* v. *Patterson*, 303 F. 2d 369, 373 (2nd Cir. 1962), was merely that under the Norris-LaGuardia Act, a labor dispute may exist whether or not the parent and subsidiary were a single entity and "regardless of whether the disputants stand in the proximate relation of employer and employee". This case has no application to the issue here involved.

Calcasieu, Somerset, Nettleton, Price Valley, and *National Shoes* cases. Here, the Board has found that United Fruit Company and Empresa each has its own officers and directors, who have no association with the other company (IR. 13).

2. *No participation of parent in subsidiary's labor negotiations.*

Obviously, parent participation in the labor negotiations of the subsidiary is indicative of parental control sufficient to create the parent as a joint employer, with the subsidiary, of the latter's employees. *NLRB* v. *A. K. Allen Co.*, 252 F. 2d 37 (2nd Cir. 1958). Such participation was also found in the *Andrews, Jones, Concrete Haulers, Nettleton* and *National Shoes* cases. The finding of the Board here is that Empresa solely runs its own labor relations (IR. 14). It negotiates its own contracts with Sociedad. United Fruit does not participate therein.

3. *No basic labor relations policies with respect to wages, hours or working conditions laid down by parent.*

Evidence of control is found by the courts where a parent fixes the labor relations policies of a subsidiary. *William Randolph Hearst*, 2 NLRB 530 (1937); *enf.*, 102 F. 2d 658 (9th Cir. 1939); *NLRB* v. *A. K. Allen Co.* (*supra*). The record here shows neither the fixing of labor relations policy by the parent nor consultation between subsidiary with the parent on this issue. To the contrary, the finding of the Board is that such matters are determined by Empresa alone.

4. *No common employees of parent and subsidiary and no transferability between the employees of each.*

Integration of an operation is normally evidenced by the interchange of personnel between the two companies, the transfer of employees from one to the other and the use of

common employees to perform certain mutual functions. *NLRB* v. *Williams*, 195 F. 2d 669 (4th Cir. 1952), cert. denied, 344 U. S. 834 (1952); *American Furniture Co.*, 116 NLRB 1496 (1956). United Fruit Company and Empresa have no common employees. Not one common employee has been found among the hundreds of personnel of each company.

In addition many other elements of control have been applied by the Courts—not a single one of which exists in this case. For example: the same persons or attorneys do not handle labor relations for both parent and subsidiary. *Bachman Machinery Co.* v. *NLRB*, 266 F. 2d 599 (8th Cir. 1959); *Thompson Products Inc.*, 57 NLRB 925 (1944), *mod. and enf.* 162 F. 2d 287 (6th Cir. 1947). Nor are there common executive offices, common payrolls or common books and records. *NLRB* v. *A. K. Allen, supra; NLRB* v. *Price Valley Lumber Co.*, 216 F. 2d 212 (1954), *cert. denied* 348 U. S. 943 (1955). Nor is there distribution by parent of statements of policy to employees of subsidiary. *Condenser Corp. of America*, 22 NLRB 347 (1940), *enf.* 128 F. 2d 67 (3rd Cir. 1942).

Totally absent from this record are each of the above factors and any other moving or determinative elements applied by the courts in the allegedly "settled authority" cited by the Board on page 57 of its brief. What the Board refers to as "settled authority" in fact shows that integration compelling a finding of joint employer depends on facts not here present.

B. Since there is no centralized management or common control of labor relations, United Fruit cannot be deemed a joint employer.

As noted above, the Board and the Courts are in agreement that a finding of integration must be based on the two elements of common management and common control of labor relations policy. Otherwise, every extensive

public utility system, every nation-wide communications or transportation system would be considered as a single employer for the purposes of employee organization and collective bargaining without regard to the nature of the organization or its internal administration. The Bell System has operated for many years as a series of subsidiaries all owned and controlled ultimately by one holding company. Yet, before the Board, each of these companies stands on its own individual footing as a separate employer.[3]

The Board has shown commendable consistency—with the exception of this case—in holding that, absent actual control over the labor relations policies of its subsidiary, the parent is not to be looked upon as the employer. The Board's decisions in representations cases, in discrimination cases, in interference cases, and in unlawful support cases, have been uniform in so holding, with the approval of the Courts.

Typical of such holdings are *Public Service Corp. of New Jersey*, 72 NLRB 224 (1947); 77 NLRB 153 (1948), (holding company not employer of employees of subsidiary public utilities, despite finding of integration where parent did not exercise "any immediately effective control" over subsidiares); *Butte Water Company*, 117 NLRB 484 (1957) (subsidiary of Anaconda Company held to be sole

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[3] *Pacific Telephone & Telegraph Co.*, 85 NLRB 713 (1949); *Mountain States Telephone & Telegraph Co.*, No. 30-RC-276 (1950); *New York Telephone Co.*, 100 NLRB 1374 (1952); *Pacific Telephone & Telegraph Co.*, 80 NLRB 107 (1948); *Northwestern Bell Telephone Co.*, 79 NLRB 549 (1948); *Southern Bell Telephone & Telegraph Co. Inc.*, 78 NLRB 814 (1948); *Illinois Bell Telephone Co.*, 100 NLRB 101 (1952); *Southwestern Bell Telephone Co.*, 108 NLRB 1106 (1954); *New England Telephone & Telegraph Co.*, 90 NLRB 639 (1950); *Ohio Bell Telephone Co.*, 87 NLRB 1555 (1949); See, e.g. *Ozark Central Tel. Co.*, 83 NLRB 258 (1949), where parent Bell was held not the employer of the subsidiary's employees because "the record does not show that Bell controls the labor relations policies of Ozark" (at p. 259).

employer); *Spartan Cafeteria Corp.*, 109 NLRB 166 (1954) (subsidiary operating a cafeteria for parent's employees held a separate, and not a joint, employer).

In *American Furniture Co.*, 116 NLRB 1496, 1497 (1956), three furniture stores were engaged in the same business, had common ownership and interlocking directors and officers. The Board refused to treat the three corporations as a single employer. The basis for the Board's decision, applicable *a fortiori* here, was stated as follows:

> "The record further reflects that each employer is a separate legal entity; that each has its own stores, warehouse, offices, payroll division, financial organization, and each maintains and files separate tax returns. Each employer has a general manager who is in charge of, and who formulates the operational policies for, his store. There are no joint meetings of directors or officers of the three employers to discuss the business or policies. There is no interchange of employees; each employer does its own hiring and determines its own 'questions of policy.'
>
> From the foregoing, we conclude that each employer operates independently, and not as a part of a single integrated enterprise with centralized management and central control over labor relations policies."

The separateness of Empresa and United Fruit is even more clear.

C. United Fruit Company's chartering of Empresa's ships is not evidence of integration.

Wherever the Board in its decision and brief speaks of integration, it is referring to nothing more than the time charter relationship between Empresa and United Fruit. It lays great emphasis on the fact that the two companies are engaged in a venture to which both contribute to the

overall result. Obviously this engagement in a common enterprise is true of all time charter arrangements.

The use of Empresa ships in moving United Fruit Company's cargo—as well as the cargo of other private owners—is not a factor which supports a determination of integration. Similar fact situations have been considered many times by the Board without a finding of integration. See, e.g., *Liquid Transport Corp.*, 111 NLRB 376 (1955); *Clark Concrete Corp.*, 116 NLRB 321 (1956).

In *Liquid Transport Corp., supra*, two related corporations supplied tractors to haul trailers operated by a third related corporation. The Board refused to consider the two tractor corporations, or all three corporations, as one employer, saying: "Upon the above facts, we find that Troy and Pierson are not sufficiently integrated with each other or with Liquid to constitute a single employer" (p. 377).

Similarly, in *Clark Concrete Corp., supra*, the Board refused to treat three corporations as a single employer, although the same individuals were officers and directors of three corporations, each was engaged in the manufacture of concrete products, and one corporation sold its product to the other two corporations for resale to their customers. The basis for this ruling was the significant fact that each corporation supervised its own business with its own plant manager who hired and discharged his corporation's employees and controlled its own labor relations policies.

Just a few weeks ago, the Board once again reaffirmed its position that there must be central management and control of the labor relations in order to establish a "joint employer" relationship. In the case of *Printing Pressman's Union*, 138 NLRB No. 137, 51 LRRM 1169 (October 1, 1962), which dealt with a charge of secondary boycott, the Board held that "notwithstanding the fact of single ownership, and the existence of some common officers and directors of the two corporations", the parent

and its subsidiary were to be considered as separate entities and not joint employers. This determination was based on its finding that the two corporations were "operated in substance as separate and autonomous corporations" hundreds of miles away from one another, with different and independent labor policies. Here, the distance between Empresa's directors in Puerto Cortes and the Boston office of United Fruit, together with Empresa's complete autonomy in determining labor policies, requires a similar result *à fortiori*.

Thus, both before and since its decision in this case, the Board has looked for the basic factors of integrated management and centralized control of labor relations policies. Here, the Board has ignored its own well established principles and has erroneously held that United Fruit and Empresa constitute a "joint employer" notwithstanding the fact that there is no centralization of management or control of labor policies.

* * *

To hold United Fruit to be an employer of the Honduran seamen is to place on it a responsibility for participation in Empresa's labor relations which it has not voluntarily assumed. Under no legal theory so far devised can United Fruit Company reasonably be held to be the employer, either jointly or singly, of Honduran seamen, with whom it has no relationship other than as time charterer and stockholder of the shipowner. The unanimous ruling of the Court of Appeals that "[w]e consider the Board's statement that United Fruit is a 'joint employer' to be an erroneous legal conclusion, which must be disregarded" (IR. 62) is supported by the Board's own findings of independence of Empresa in operating its ships, hiring its crews and "handling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel" (IR. 14). This unanimous ruling should be upheld.

POINT II

Application of the Act to Honduran citizens would conflict with

(A) The Congressional intent limiting the act to "working men of our own country and its possessions",

(B) The treaty with Honduras which gives that country exclusive jurisdiction over all matters involving the internal order of Empresa's ships including every aspect of the employment relationship,

(C) The foreign relations and defense policies of the United States,

(D) The law of nations which require American forbearance to avoid collision with the Honduran law.

United Fruit Company's direct interest in this proceeding ends with a determination that it is not an employer of the Honduran seamen. If for any reason this Court were to hold otherwise on this issue, United Fruit would argue that the Act nevertheless does not apply for the reasons briefly developed below.

A. The Act is Limited to Working Men of the United States and its Possessions.

The Board's application of an "effects" test to determine the extent of its jurisdiction (Bd. Br., pp. 14-22) mistakes what Congress could do with what Congress, in fact, did.

This Court has stated that Congress did not fashion the Act to "resolve labor disputes between nationals of other countries operating ships under foreign laws", and that the background and history of the Act shows it to be "concerned with industrial strife between American employers and employees." *Benz* v. *Compania Naviera*

Hidalgo, 353 U. S. 138, 143-144 (1957). This Court further declared that the legislative history of the Act inescapably describes the boundaries of the Act as including only the working men of our own country and its possessions, 353 U. S. at page 144. See also, *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U. S. 365, 369 (1960).

The lesson of *Benz* is that an "effects" test alone is not appropriate to a proper examination of the extraterritorial scope of the National Labor Relations Act. In that case, the involvement of three American unions in a dispute on a foreign ship berthed at an American pier in American waters affected interstate commerce to a point sufficiently substantial to justify the interposition of federal power ". . . if Congress had so chosen" (353 U. S. 142). But Congress must speak explicitly and directly before a Honduran labor relationship which affects both Honduran and American commerce, is to be made subject to the Act.

The Board's argument (Bd. Br., pp. 22-23) that its jurisdiction encompasses every question of representation affecting commerce, including all movements between any foreign country and any state, ignores the necessity for avoidance of collision between the American law and that of other friendly powers. As the Court of Appeals has said below (IR. 72) the words of the statute are not to be "thus stretched to their literal bounds because statutes relating to international matters are construed in accordance with international usage. *Lauritzen* v. *Larsen*, 345 U. S. 571, 577-579, 581-582 (1953)."

Nor does the fact that, in *Benz*, the ship was temporarily in an American port, while the ships here visit American ports with some regularity, extend the scope of the Act's coverage. For, as this Court said in *Lauritzen*, regularity of contract is usual in the shipping industry and:

> ". . . the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country." (345 U. S. at p. 581.)

Frequency of contact is thus not a proper test to apply to Board jurisdiction since almost all foreign line operations sail their ships to and from American harbors with clock-like regularity. Where Congress has desired to apply American law to foreign flag ships, it has found no difficulty in doing it with clarity.[4]

Congress has not, either by express declaration or by implication, shown any desire to impose its policies upon the relationship between foreign crews and foreign employers. To the contrary, Congress has limited its labor legislation not only to American workmen, but also to American workmen within the territorial limits of the United States. *Foley Bros. Inc.* v. *Filardo*, 336 U. S. 281 (1949); *New York Central R.R.* v. *Chisolm*, 268 U. S. 29 (1925); *Air Line Dispatchers Ass'n.* v. *National Mediation Board*, 189 F. 2d 685 (D. C. Cir. 1951) certiorari denied 342 U. S. 849; *Air Line Stewards & Stewardesses Ass'n.* v. *Northwest Airlines Inc.*, 162 F. Supp. 684 (D.

[4] La Follette Seamens Act of 1915, 38 Stat. 1164 (1915); Steamboat Inspection Act, Rev. Stat. §§ 4399, 4401, as amended, 46 U.S.C. §§ 361, *et seq.*; The Dangerous Cargo Act, Rev. Stat. § 4472 (1871), as amended, 46 U.S.C. §§ 170, *et seq.*; The Load Lines for American Vessels Act; 45 Stat. 1492-1494 (1929), as amended, 46 U.S.C. §§ 85, *et seq.*; The Passenger Act, 22 Stat. § 186 (1883), as amended, 46 U.S.C. §§ 151-163, and various other statutes such as Rev. Stat. § 4400 (1871), as amended, 46 U.S.C. § 362; 41 Stat. 998 (1920), as amended, 46 U.S.C. § 882; 53 Stat. 1049 (1939), as amended, 46 U.S.C. § 224a.

In making the statutes specifically applicable to foreign ships language such as the following is used:

> "This section shall apply as well to foreign vessels while in waters of the United States . . ." 46 U.S.C. § 599(e).
>
> * * * *
>
> "And all foreign private steam vessels carrying passengers from any port of the United States to any other place or country shall be subject to the provisions of Sections 170, 391, 392, 399, 400, 402, 481, 494, 495, 497 and 498 of this title, and shall be liable to visitation and inspection by the proper officer, in any of the ports of the United States, respecting any of the provisions of the sections aforesaid . . ." 46 U.S.C. § 362.

Minn. 1958, *aff'd* 267 F. 2d 170 (8th Cir. 1959) certiorari denied, 361 U. S. 901 (1959).

This Court has declared that in the delicate and sensitive area of international relations the involvement of American law is not to be assumed unless the Congressional intent to invade the area is clear and express. *Benz, supra*, at page 147. The canon of construction continuously applied in this field is that expressed in *The Charming Betsy*, 2 Cranch. 6 U. S. 64, 118 (1804) to the effect that:

> "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ."

Here, Honduran law has held sole sway since 1941 when Empresa was first formed. To cast aside now, after 20 long years of non-application of the Act, the Honduran law which has substantially regulated the employee-employer relationship, is a harsh thrust in the sensitive field of international relations. If it is to be made, those having clear jurisdiction in this delicate field should make it. But Congress has not spoken and the executive branch has taken a position contrary to the Board.

B. Under the Treaty Honduras Has Exclusive Jurisdiction Over Internal Order.

Article VI of the Constitution makes the Treaty of Friendship, Commerce, and Consular Rights between the United States of America and the Republic of Honduras dated December 7, 1927, the supreme law of the land. Article X of the Treaty (45 Stat. 2625) concededly gives Honduran nationality to Empresa's ships (Bd. Br., p. 45). Such Honduran nationality makes the Honduran law the sole power over all occurrences and relationships on the ships while on the high seas. 1 LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW, § 146 (8th ed., 1955); *The S.S. Lotus*, 2 HUDSON WORLD COURT REPORTS 20 (1935) (Perm. Ct. Int. Just., 1927). Further, Article XXII of the Treaty (45

Stat. 2634) gives exclusive jurisdiction to Honduran officials over all matters aboard the ships dealing with labor relations between the shipowner and the crew even when in United States ports.' There it is provided that an Honduran consular officer "shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country," and that such an officer "shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit."[5]

Internal order involves all things which make up the relationship between the master and crew and include all the terms and conditions under which a seaman is to work. Nor is the term limited to the power of the Master "to punish mutiny and otherwise discipline his crew . . ." (Bd. Br., p. 40) as is urged by the Board. This Court long ago held that wages, living conditions, discipline of the crew, and other matters of employee relationships are questions of "internal order" which are governed by the law of the flag. *The Belgenland*, 114 U. S. 355, 367 (1885); see also, *Simpson* v. *Hamburg American Line*, 17 A.M.C. 1469 (D. Canal Zone 1939); *McQuade* v. *Compania de Vapores, San Antonio, S.A.*, 131 F. Supp. 365 (S.D.N.Y. 1955) This Court, in defining the application of *Benz* in *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U. S. 365, at page 369, stated:

> "The question in the *Benz* case was whether the Labor Management Relations Act of 1947 governed the *in-*

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[5] The Board's argument (Bd. Br. p. 45) that the language of Article XXII gives concurrent jurisdiction in matters pertaining to wages and execution of contracts because of the failure to repeat the word "exclusive" before the second use of the word "jurisdiction", reads too much into the provision. If the Treaty intended to give concurrent jurisdiction elsewhere it would have so provided, and would have also identified the recipient of such jurisdiction. The use of the word "also" before the words "have jurisdiction" shows that the grant of jurisdiction in this sentence is at least as broad as that described in the part of the Treaty giving "exclusive jurisdiction."

> *ternal labor relations* of a foreign ship and its foreign workers under contracts made abroad while that ship happened temporarily to be in American waters. The *Benz* case decided that the *Labor Management Relations Act had no such scope or coverage . . .*" (emphasis supplied)

Collective bargaining on wages and other working conditions and grievance administration affecting seamen directly affect the "internal labor relations" of the Honduran flag ships. This subject should be left where it has been for decades—exclusively within the jurisdiction of Honduras.

C. Assertion of Jurisdiction Would Impinge Directly Upon the Foreign Relations and Defense Policies of the United States.

The Board in its brief (pp. 46 through 57) argues that the taking of jurisdiction by the Board neither subverts defense policy nor unsettles international relations.

The brief answer to the arguments therein made must be that the Board has not been entrusted either by the Executive or by Congress with jurisdiction in these two areas.

For the purposes of this brief it is sufficient to point out that the matter is clearly one of judgment in delicate areas affecting the foreign relations, defense and security of the United States. It is the judgment of the Defense Department that the Board's action would in fact subvert defense policy; it is that of the State Department that the Board's action does in fact unsettle international relations (Brief for the United States, pp. 7-11).

In the absence of clear Congressional mandate, an administrative agency having no authority over defense policies or international relations should not be permitted to decide questions of this magnitude over which the President, his Cabinet and executive departments, are given full responsibility.

D. The Law of Nations Requires the Board to Defer to the Honduran Law Under the Facts of This Case.

Admittedly, ". . . Honduras does have laws which apparently would conflict with the Act" (Bd. Br. p. 53). General principles of maritime and international law therefore unquestionably require the Board to reach an accommodation with the law of Honduras ". . . so as to minimize the possibility of collision between two sovereignties, each applying its own laws to the transaction" (Id. at p. 53). It is to be assumed that in enacting the National Labor Relations Act, Congress did not intend . . . "to violate the obligations of this country to other nations" including Honduras. *McLeod* v. *U. S.*, 229 U. S. 416, 434 (913); *U. S.* v. *Palmer*, 3 Wheat. (16 U. S.) 610, 4 L. ed 471 (1818). The inexorable rule of international law gives the flag nation the right to impose its law on the internal economy of the ship without interference from any other source. *The Muscat Dhows Case*, 1905, The Hague Court Reports 96 (Scott ed. 1916).

In this case, the non-American nationality of both ships and seamen makes irrelevant any evaluation of points of contact such as was made both by the Court and the Board. Such evaluation has no reasonable basis where there is being considered the permanent employer-employee relationship of Honduran citizens and residents working on Honduran flag ships. The Board's assertion of jurisdiction would affect every aspect of the rights and duties of employer to employee, including hiring practices, grievances, collective bargaining, wages, and other conditions of employment. It would require Empresa to violate either American or Honduran law. "The conflict between the United States and Honduran law would be constant" (IR. 78). Evaluation of ever changing points of contact cannot resolve the constant conflicts which necessarily must arise in labor relations problems. That the relationship concerns the employment rights of Honduran citizens

and residents on Honduran flag ships is a factor of sufficient importance to negate all other considerations.

But even if the Court of Appeals were correct in applying points of contact test to this situation, it is abundantly clear that it was correct in holding that the minimal contacts Empresa and its Honduran seamen have with the United States "are substantially outweighed for the purpose here at issue by Honduras' interests" (1R. 77).

The seven points of contact established by *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953), were tailored to fit the transient tort action of the injured seamen which would involve the forum only during the course of a single litigation. The seven factors are: (1) place of the wrongful act; (2) law of the flag; (3) allegiance or domicile of the injured; (4) allegiance of the defendant shipowner; (5) place of contract; (6) inaccessibility of foreign forum; (7) the law of the forum.

Modification of these points of contract to make them applicable here reveals that, in any event, all contacts are with Honduras. If, rather than the place of wrongful act, we consider where the employment relationship is carried out, we find that Honduran soil and Honduran ships in Honduran territorial waters and on the high seas are places of employment far more constant than the American port where the Honduran seamen may land only by grace of the immigration authorities. The law of the flag which this Court has termed "the most venerable and universal rule of maritime law" which "overbears most other connecting events in determining applicable law" (345 U. S. at 584) has applied to these Empresa vessels since its inception. Allegiance and domicile of the seamen clearly and unquestionably is in Honduras.

Allegiance of the ship owner, place of contract, inaccessibility of foreign jurisdiction and law of the forum are all factors which require the forbearance of American law. The ship owner is Empresa, a Honduran corporation; its

seamen signed their employment contracts and are hired in Honduras; their grievances and complaints have been handled for decades by Honduran officials in Honduran ports which are accessible to them at the end of each voyage; Honduras is the forum which has exercised complete and constant jurisdiction over this relationship.

As noted above we believe that any discussion of contacts is not relevant since the basic determination should be based on the law of the flag. Application of the definite and certain standard of the law of the flag makes all such valuation academic, however. It also avoids uncertainty and the type of questionable weighing of foreign factors with American contacts that it alleges it engages in. However, an examination of the six decisions referred to at length in the Board's brief shows that it uses the contact's theory as an excuse for assuming jurisdiction.[6] Even if a point of contacts test were valid—and we submit it is not—then no one of the six cases relied on by the Board is apposite because each of these cases involves fact patterns which are totally different at the following illustrations show. None of Empresa's ships have ever flown the American flag or transferred from American registry as were the ships in *West India, P & O,* and *Dalzell.* Empresa's ships regularly visit Honduran waters and engage in the trade and commerce of Honduras, unlike the ships in *West India, P & O* and *Owens-Illinois.* Here, the seamen are not hired by an American corporation, nor does any American person, firm or corporation control in any way the hiring or labor relations policy, as was the case in *P & O, Hamilton,*

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[6] These cases are *West India Fruit & Steamship Co.* (West India), 130 NLRB 343; *Owens-Illinois Glass Co.* (*Owens-Illinois*), 136 NLRB No. 32; *Peninsular & Occidental Steamship Co.* (P & O), 132 NLRB 10; *Eastern Shipping Corp.* (Eastern), 132 NLRB 930; *Hamilton Bros.*, 133 NLRB No. 85; *Dalzell Towing Co.* (Dalzell), 137 NLRB No. 48. Only in the latter case did the Board not take jurisdiction on the grounds that the ship spent only about a quarter of her time in voyages on which it entered U. S. ports, a point of contact which *Lauritzen* considers to be unimportant.

West-India and *Owens-Illinois*. Empresa's crews are composed of citizens of the flag country almost exclusively, which was not the case in *P & O*, *West India* and *Eastern*. In addition, such factors as common officers and directors, and common control of operations and labor relations policies by parent and subsidiary, present in a number of the other cases, are absent here.

Empresa has never owned American Ships; it has never employed American seamen; it has always been a part of the Honduran economy, carrying Honduran products to foreign ports and foreign products to Honduras. The cardinal importance in this case of the law of the flag is bolstered by so many other substantial contacts of the crew, of the ships, and of the employer to Honduras, as to require American law to defer to Honduras on this question of union representation affecting the internal order of Honduran flag ships.

CONCLUSION

The judgment of the Court of Appeals for the Second Circuit should be affirmed.

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Respectfully submitted,

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